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Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

12 CR 626-06

5 KEVIN BURDEN,

6 Defendant.

7 -----x

8 New York, N.Y.
9 September 30, 2014
10:00 A.M.

11 Before:

12 HON. EDGARDO RAMOS,

13 District Judge

14
15 APPEARANCES

16 PREET BHARARA
17 United States Attorney for the
18 Southern District of New York
19 ANDREW BAUER
20 KAN M. NAWADAY
21 Assistant United States Attorneys

22 LEE GINSBERG
23 AVRAHAM MOSKOWITZ
24 Attorneys for Defendant
25

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(In open court; defendant present)

THE COURT: Please be seated.

United States v. Kevin Burden.

Could you please state your name for the record.

MR. BAUER: Andrew Bauer, for the government.

THE COURT: Mr. Bauer.

MR. GINSBERG: Good morning, your Honor, Lee Ginsberg and Avi Moskowitz, appearing for Mr. Burden.

THE DEFENDANT: Good morning, your Honor.

MR. GINSBERG: If I might, your Honor, I wanted to note Nancy Tricamo, who is our mitigation specialist who worked on the case is present in the courtroom.

THE COURT: Good morning to you all.

And good morning to you, Mr. Burden.

THE DEFENDANT: Good morning, sir.

THE COURT: This matter is on for sentencing.

And in preparation for today's proceedings, I have reviewed the presentence report dated April 25, 2014, prepared by probation officer Kisha Singleton, which includes a recommendation. I have also reviewed the letters from Mr. Burden's attorneys and mitigation specialist dated September 19, 2014, and a supplemental letter from the mitigation specialist dated September 26, 2014.

I have not received a submission from the government, is that correct Mr. Bauer?

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1 MR. BAUER: That's correct, your Honor. Since we
2 expedited the sentencing, the government did not have an
3 opportunity to put in a submission. What I did hand up to your
4 Honor is a document that you are familiar with from the trial
5 that happened last month. It is the transcript of the excerpts
6 from the video between Mr. Burden and the cooperating witness
7 Jamar Mallory. And I submit that in lieu of a formal
8 submission.

9 THE COURT: Very well. I am familiar with this
10 document.

11 Let me begin with you, Mr. Ginsberg. Have you
12 received a copy of the presentence report and discussed it with
13 your client?

14 MR. BAUER: Yes, your Honor.

15 THE COURT: And, Mr. Burden, did you receive a copy of
16 the presentence report and discuss it with your attorney?

17 THE DEFENDANT: Yes.

18 THE COURT: Are there any objections to the report
19 regarding its factual accuracy?

20 MR. GINSBERG: No, your Honor.

21 THE COURT: Very well. Although I am not required to
22 impose a sentence within the guideline range, I am required to
23 consider the guidelines in imposing sentence. And to do so, I
24 need to make that calculation.

25 Mr. Burden entered a plea of guilty to a superseding

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1 information charging him with a violation of 18 U.S.C.
2 Section 924(h), providing a firearm to another with the
3 knowledge that it would be used in connection with a crime of
4 violence or a drug trafficking crime. That count carries a
5 maximum term of imprisonment of 10 years.

6 The offense base offense level for Mr. Burden's
7 offense is 43, pursuant to 2K2.1(c)(1)(B) of the U.S. Sentencing
8 Guidelines because a victim was killed in connection with the
9 offense under circumstances that would constitute murder under
10 18 U.S.C. Section 1111.

11 From that, three levels are deducted because Mr.
12 Burden pled guilty and accepted responsibility for the offense,
13 and did so in a timely manner.

14 And, Mr. Bauer, is the government not objecting to an
15 additional reduction of two levels?

16 MR. BAUER: On what grounds, your Honor?

17 THE COURT: On the ground that -- I guess the drug --
18 well, those would only affect the drug trafficking offenses,
19 correct?

20 MR. BAUER: Yes, your Honor.

21 THE COURT: That yields a total offense level of 40.
22 And Mr. Burden is in criminal history category III and,
23 therefore, is facing a guidelines sentence of 360 to life.
24 However, because of the particular charge to which he pled
25 guilty he is only looking at a maximum of 120 months, and that

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1 is the effective guideline range.

2 Is there any objection to that calculation, Mr.
3 Ginsberg?

4 MR. GINSBERG: No, your Honor.

5 THE COURT: Mr. Bauer.

6 MR. BAUER: No, your Honor.

7 THE COURT: Does the government wish to be heard prior
8 to sentence being imposed.

9 MR. BAUER: We do, your Honor.

10 Judge, I imagine that a lot of the conversation here
11 today from defense counsel is gonna be about Mr. Burden's
12 medical condition. And rightfully so. It seems incredibly
13 serious and, in particular, it seems to have had a significant
14 impact on Mr. Burden.

15 I can confirm for you that I have spoken to the MCC
16 personnel that, because of the kidney infection that Mr. Burden
17 is suffering from, because of the thrice weekly dialysis
18 treatments that he has been forced to undergo, he -- I think it
19 was about two weeks ago that he began refusing treatment and
20 pulling the cords out of his arms.

21 So, certainly, the condition is serious, as well as
22 how it is treating him -- or how it is affecting him
23 psychologically and emotionally is very serious. All that
24 said, your Honor, I don't want the medical conversation to
25 swallow what we're doing here. We're here to sentence

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1 Mr. Burden for conduct, very serious criminal conduct that you,
2 after sitting through the trial of three of his co-defendants
3 are all too familiar with.

4 I handed up the excerpts of the recorded meeting
5 between Kevin Burden and Jamar Mallory. It was played
6 throughout trial on a couple of occasions. And defense counsel
7 and Mr. Burden have had that tape now for a couple of years.
8 It demonstrates, your Honor, as you know, just how serious and
9 how involved Mr. Burden was in the criminal atmosphere in
10 Newburgh.

11 There is one excerpt in which he talks all about what
12 it's like, and why it's important to join the Newburgh Bloods,
13 teaches you to have faith in yourself as a man, how to be a
14 grown man. The powers that be just being Blood. It should be
15 about being better.

16 He was, as you know, your Honor, Mr. Burden was a high
17 ranking member of the Bloods. He hosted Blood meetings at his
18 house at 261 Street. He also sold drugs on a number of
19 occasions with the trial defendants out of that house on 261
20 Street. 261 Street was a weed spot. They sold marijuana. But
21 cooperating witnesses testified at trial that they saw him
22 selling crack along with other trial defendants, including we
23 heard, Tyrell Whittaker. And then, of course, there is his
24 involvement with the guns. And much of the excerpts here
25 relate to the chrome joint, the chrome gun that he had gotten

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1 the week before, and he was loaning out to L-1 to do this
2 robbery. But, Judge, that evidence is before your Honor in
3 great detail, so I won't belabor it too much. But I will point
4 you to excerpt five, where he talks about having two other
5 guns. Because he was beefing with the Jamaicans. It was a
6 short excerpt. It said, remember, I told you I was beefing
7 with Jamaicans and I had the guns with me at tall times, do you
8 feel me? I keep two in the bookbag and two in my waste -- I'm
9 sorry, that is four guns that he mentioned on that tape.

10 Mr. Burden was a highly-connected seriously-involved
11 member of the bloods. And what that meant was this very, this
12 very violence, the violence that, when he handed a gun to
13 Tyrone Whittaker and Glenn Thomas, it was without dispute that
14 he did not know that someone was going to die that night. We
15 have never said that. It's frankly the reason why we allowed
16 him to plead guilty to the 924(h) charge in recognition that he
17 didn't know there was going to be a murder. But what he did
18 know was that he was handing a gun to two violent individuals
19 to go do a violent robbery in which it's not surprising that
20 gunfire erupted. It is not surprising that people were shot.
21 It is not surprising that somebody died. And that is about as
22 serious conduct as you can get.

23 Judge, he has gotten an incredible benefit, frankly,
24 by being able to plead guilty to the 924(h) charge. The proof
25 was very strong against him. You saw it. And we could have

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1 very easily kept the line and told him he had to plead to the
2 924(j), which his guidelines here would be life. There would
3 be no statutory cap.

4 But in our effort to be reasonable, and in an effort
5 to reflect what we think Mr. Burden's conduct was, is he was
6 just handing guns over because another member of the bloods
7 asked him for it. We thought that the 10 year number was
8 appropriate. Now you're faced with the additional information
9 of his medical treatment. And I do not want to belittle it.
10 But, what I will say, is that I've spoken to people in the BOP.
11 And they have represented to me Mr. Burden will almost
12 certainly be designated to a medical facility, either Devons or
13 Butner. Those facilities are specifically designed to handle
14 treatment that Mr. Burden needs. In fact, they were telling me
15 about a kidney transplant that took place at, I think it was
16 Butner, last year. I have no doubt that this MCC arrangement
17 for his dialysis has been hard on him. It has been hard on the
18 MCC, as well. They have a slightly different view as to how it
19 has all happened, as compared to Mr. Ginsberg and Moskowitz's
20 view. But they are, admittedly, not equipped to handle
21 bringing Mr. Burden to dialysis three times a week. It has not
22 been a good set-up. I have no quarrel with that.

23 What I am suggesting, your Honor, is that when he gets
24 to Butner, or when he gets to Devons, that will be a good
25 set-up for him.

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1 And in defense counsel's submission, they suggest that
2 Mr. Burden knows of a place in Newburgh where he can start
3 getting dialysis there. I don't know. So I won't speculate,
4 except for to say I'm not sure if that is going to be any
5 better than what he will get at a dedicated facility like
6 Butner or Devons, where he will be there and be able to receive
7 treatment on a regular basis, without the complexity of this
8 transport that he has had to deal with since he has been at the
9 MCC.

10 THE COURT: Because I have only seen Mr. Ginsberg's
11 letter, what is the MCC saying about the current situation, the
12 current set-up.

13 MR. BAUER: Well, they were the ones who had asked me
14 to expedite the sentencing a couple of months ago, once they
15 realized that this dialysis was necessary. And when I had
16 attempted to do that, Mr. Burden -- Mr. Moskowitz and Mr.
17 Ginsberg wanted to really understand what the medical condition
18 was because, rightfully so, they wanted to present it to your
19 Honor. So they wanted him out of the MCC for a couple of
20 months, both for their benefit and for his.

21 They have been very candid that this has not been an
22 easy set-up for them, between the marshals having to do the
23 transport, or the MCC doing the transport. It has been very
24 difficult on them. And so they, when posed with the situation
25 that we were last week when we were told that he was now

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1 refusing treatment and refusing the transport to the hospital,
2 that is when we came up with the solution of just getting this
3 on your calendar as quickly as possible. And that's why we're
4 here today. But the MCC is very eager to have him transported
5 and moved to a facility at Devons or Butner. So the one
6 specific request, besides the guidelines of 120 months, your
7 Honor, is that you enter the judgment, if it at all possible
8 today, or as soon as practicable for your Honor. That way we
9 can expedite his designation out of the MCC.

10 THE COURT: I don't have, before me, anything from a
11 doctor concerning his current medical condition.

12 Have you spoken with medical personnel at MCC, Mr.
13 Bauer?

14 MR. BAUER: No, I have not. I have spoken to the
15 lawyers at MCC who have spoken to the doctors. So it's a bit
16 of a game of phone tag, or telephone, sorry. But everything
17 that they have told me is consistent with what is in Mr.
18 Moskowitz' and Mr. Ginsberg's letters, as well Ms. Tricamo, I
19 think, her letter as well. And that is that it is an
20 incredibly serious kidney infection that requires dialysis and
21 will ultimately require, or is likely require a transplant.

22 THE COURT: Okay. Thank you, Mr. Ginsberg. Or Mr.
23 Moskowitz.

24 MR. GINSBERG: Thank you, your Honor.

25 There is a lot of different layers, I think, to this

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1 sentencing argument that I am making here this morning.

2 To begin with, I think it's fair to say that the
3 government did justice when they offered the plea that they did
4 to Mr. Burden. And I think Mr. Bauer recognizes that, today,
5 notwithstanding the fact that the guidelines still point your
6 Honor towards the murder guideline, so the numbers are very
7 high. I think the government realized, early on in this case,
8 the limitation of Mr. Burden's involvement and conduct. And so
9 that's why they offered the plea which caps the sentence at 120
10 months.

11 And I bring that up first for two reasons. One, I
12 think it's a credit to the government that they recognized that
13 and did that. Because, as your Honor knows, both from this
14 part of your life and your prior history, that that is not
15 always the case. It's not always recognized that way which
16 makes it much more difficult at the time of sentence, because
17 the range could be so wide that it's harder to focus in on what
18 the right sentence is to do, when you are looking at a
19 360 month possibility.

20 Secondly, I think it is important, because I think the
21 focus should be on the 0 to 120 months. Notwithstanding the
22 fact that the guidelines are what they are, that's where I
23 believe we should be looking. Not just because there is a
24 statutory cap, but because essentially the government said in
25 making that plea offer, this is the range where we think an

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1 appropriate sentence can be meted out.

2 It's not only that Mr. Burden is now suffering from
3 the medical condition that he has, he has a history which we
4 presented to your Honor in our submission, with some
5 documentation and with the letter, and the portions of
6 Ms. Tricamo's earlier submission that she made to us in the
7 death penalty phase, to demonstrate that his was not an easy
8 life to begin with. That, frankly, not because of his own
9 doing, and consistent with many other cases that we see in this
10 courthouse, Mr. Burden was in a situation from his early
11 childhood where he did not have the kind of support and
12 guidance and love and protection of a family or parents that
13 one would hope everybody would have in their life.

14 And for that reason, among others, he ended up in and
15 out of institutions for most his young life, and through his
16 teens. We didn't want to burden the Court with literally the
17 two and a half or three boxes of records that we have from all
18 of those facilities. But Mr. Moskowitz and I have those boxes
19 in our office, and we read through those documents. And it
20 suggests, if nothing else, how a person like Mr. Burden ends up
21 in a situation like he was when he was arrested for this case,
22 and for so many other conduct that is mentioned in the
23 probation report that occurred before this case.

24 And as I'm sure you have heard many times, I'm not
25 saying this to excuse the current conduct, but there is a

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1 history. There is a history that sets the framework for how it
2 got to be like that. This is not an individual who was working
3 for a hedge fund and making ten, twenty million dollars a year
4 and decided to be greedy and make another \$20 million a year,
5 and had everything in life that life can afford to that person,
6 but it wasn't enough. We're talking about a very different
7 situation. And I think that would have been the principle
8 argument that we would have made, in addition to the 120 month
9 cap, had the current medical situation not occurred.

10 And we're not here today in a malpractice lawsuit.
11 And I'm not going to ask your Honor to make a determination as
12 to how this came to be. I can tell you, your Honor, as an
13 officer of the court, that when I first found out about the
14 current medical condition that Mr. Burden has, I immediately
15 took responsibility. Because I thought that it was something
16 that I didn't do, or Mr. Moskowitz didn't do, because we were
17 not paying enough attention to our client. Even though we knew
18 we had seen him regularly, and we had talked to him about all
19 of his issues, and we had Ms. Tricamo working with us. We got
20 his records, his whole history, his school records, spoken to
21 his family. I really had the sense of panic that I was at
22 fault and I missed something.

23 Once we got the records from the facility and we had
24 the records independently reviewed by medical professionals, I
25 guess it was a small relief to me that at least I was not at

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1 fault. But it is not a relief to Mr. Burden as to how this
2 occurred.

3 And, again, I'm going to say I don't want to point
4 fingers, but what I will say, in this instance and more
5 generically, is that I have had too many cases over the last
6 number of years, where situations either like this or close to
7 this, have occurred. And, in fact, coincidentally, I'm
8 currently on trial before Judge Engelmeyer. And when I left
9 the building the other day, I ran into -- not literally, but I
10 saw Judge Sullivan on the street with his trial advocacy class.
11 And I stopped him, because he is the liaison to the MCC and
12 MDC. And I told him, as soon as I had enough time, I was going
13 to send him a letter. Not just about Mr. Burden's case, but
14 about two other cases that I currently have, where situations
15 almost as acute as this, are going on. And in which no matter
16 how many times I have raised it with the assistant -- and it's
17 not their fault. And how many times they have called the
18 facility, and they have spoken to the Legal Department, and we
19 have had to raise it in court to a judge, these situations
20 simply get out of hand. And it may be that the Bureau of
21 Prisons medical facilities, outside of the immediate New York
22 City area are better equipped to deal with situations like
23 this. But it doesn't mean that people should end up in
24 situations like this because local facilities don't have the
25 capability, or desire, or whatever else it is that is missing,

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1 to be able to deal with situations before they become so acute
2 that somebody's life is on the line.

3 Now, all of that speaks to, I hope, what an
4 appropriate sentence is in this case. Certainly, I suppose,
5 your Honor can take some comfort that if you sentence
6 Mr. Burden to additional jail time, the treatment he will get
7 at Lexington or Devons or some other place, will be better,
8 because it has to be, than what was happening in the MCC. It
9 was not only the medical treatment, however. And that's why we
10 submitted, just the other day, the letter from Ms. Tricamo who
11 may be one step removed from the partiality that we have, from
12 the subjectiveness that Mr. Moskowitz and I have in this case.
13 Because she visited with Mr. Burden at the hospital and spoke
14 to people at the hospital, and was able to communicate on a
15 different level after speaking to them and Mr. Burden, not only
16 the medical treatment or lack thereof, but the psychological
17 state that he was in, and the emotional treatment,
18 psychological treatment that was being put upon him by others
19 who don't understand that even if you're an inmate at a jail
20 charged with a serious crime, it doesn't make you less of a
21 human being, and you ought to be treated in the way that
22 anybody else should be treated.

23 And as much as almost anything else, that has caused a
24 profound psychological effect on Mr. Burden. Not only is he
25 facing this chronic disease that may cause him to have dialysis

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1 forever, or kidney transplant, or shorten his life, he has to
2 hear from other people and be treated from other people as if
3 he is some kind of a pariah, which does nobody any good but, in
4 fact, has occurred.

5 I don't know that putting him in jail to get medical
6 treatment at a facility is going to specifically deter him from
7 further criminal conduct, any more than the fact that he is
8 going to have to go to a dialysis center two, three, four days
9 a week, or maybe be admitted from time to time to a medical
10 facility for constant treatment. If your Honor believes that
11 that's not enough of a deterrent upon him from committing
12 crime, and he also has to be locked up, you certainly have the
13 authority to make that decision.

14 In terms of general deterrence -- and I just -- I want
15 to speak to those two issues. Because it seems to me often
16 that is where the decision comes down to. In terms of general
17 deterrent, I don't think anybody in the public, or anybody who
18 has considered committing a serious crime would say to
19 themselves, Kevin Burden was only in jail for a couple of
20 years, and he was released to spend the rest of his life on
21 dialysis, so I'm going to go commit a crime, too, because I'm
22 not going to get a serious jail sentence. I don't think the
23 wrong message would be sent to the public or to the community
24 if your Honor were to release Mr. Burden and allow him to have
25 medical treatment and to be home with his family. And without

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1 being overly dramatic about that, we don't know how much longer
2 he has to be either home with his family or in a medical
3 facility. None of us here know where this is gonna lead, or
4 whether if he needs a kidney transplant one is going to be
5 available, or whether it will be accepted or rejected by his
6 body. So I think when we talk about punishment, there are many
7 forms of punishment. And I'm not sure what's worse, to be put
8 back into jail for a period of time, or to have to live through
9 what he has lived through, and will live through, for the rest
10 of his life. And I take into consideration the crime that was
11 committed here and what he did.

12 And I'm glad that your Honor was able to sit through
13 the trial of this case, and knew about this transcript.
14 Because I think it puts his role in the right perspective, as
15 did the government's plea offer. And, frankly, as did this
16 entire conversation which Mr. Moskowitz and I have reviewed
17 many, many times, where he concedes that there were guns that
18 were given to somebody but basically says he didn't know what
19 they were going to do. It was even in a Motion to Suppress
20 submission to the Court. And the government has said here,
21 today, he never -- he never knew. So that, I think, also
22 limits it. Whether or not the fact that the day he made any of
23 these statements, he was already high because he smoked
24 marijuana, or got higher because the cooperating witness
25 continued to pour him, I think it was whiskey from a bottle at

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1 the hotel to try to get him to say more things, which he
2 didn't, because he kept saying I didn't -- I didn't know what
3 was going to happen with that, even though he was asked. Maybe
4 puts some more perspective that your Honor wouldn't have
5 otherwise had if this was just a plea with no trial and the
6 rest that your had not seen already about what who did what.

7 So having said all of that, I respectfully ask this
8 Court to balance all of the equities here -- and there are very
9 serious mitigating equities that almost never exist in cases
10 like this. Sometimes they are. Sometimes they do. And
11 sentence Mr. Burden to the time that he has already served in
12 jail, which is not an insignificant amount of time. And to let
13 him get the medical treatment that he needs, and be with his
14 family, so at least he can have the comfort of being around
15 people who care for him, and will support him, and won't make
16 it even that much more difficult for him to live with his
17 situation.

18 And I'm happy to answer any other questions. Mr.
19 Moskowitz is here. Ms. Tricamo, who saw Mr. Burden at the
20 hospital the other day, and Mr. Moskowitz saw him last night at
21 the hospital, can address or answer any questions your Honor
22 might have as to specific situations.

23 THE COURT: Can anyone give me some idea as to what
24 his medical prognosis is?

25 MR. MOSKOWITZ: Your Honor, I spoke at length to

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1 Mr. Burden's doctors yesterday. As Mr. Ginsberg I think
2 indicated, nobody can give a certain prediction as to what the
3 course here is. What they said is, he will require dialysis at
4 least three days a week for the rest of his life. He is a
5 candidate, at some point, for a kidney transplant. And he is a
6 young man. He is otherwise -- you know, assuming they can get
7 this under control, he is otherwise healthy. Whether he would
8 qualify, whether he would get one, that's you know the vagary
9 of the list, your Honor, is probably as equally familiar as I
10 am.

11 I can tell the Court, your Honor may know we had a
12 little difficulty in arranging to get him here. I ran over
13 there last night to help make the arrangements. Part of the
14 issue was that he was scheduled for surgery as early as today
15 to put in a permanent port so that the dialysis can be
16 accomplished more easily. It is my hope, one of the things
17 we -- well, depending on the sentence, Mr. Burden is scheduled
18 either, hopefully through Court order or voluntarily, to return
19 from here to Bellevue where they are waiting for him to readmit
20 him. The surgery is obviously not going to take place today.
21 But it could take place as early as tomorrow. And certainly no
22 later than next week.

23 I have been assured, and Mr. Burden was assured, that
24 if the Court were to release him and he went -- and he went
25 back to Bellevue, that the fact that he is obviously at the

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1 moment uninsured would not be a problem, they are capable of
2 taking him back in. They want to take him back. The doctors
3 are very concerned about him. All of the arrangements that
4 will be necessary for him to get in will be made upon his
5 return, one way or another. So, I can't give you a long-term
6 prognosis, because no doctor is going to tell you that. The
7 course of this disease is unpredictable. All they can tell me
8 is that he will require this treatment, or a transplant, for
9 the rest of his life.

10 THE COURT: Any insight as to the source of the
11 infection that caused this?

12 MR. MOSKOWITZ: I had conversations about that with
13 the doctors. And we consulted an outside doctor before we made
14 our submission. The precise etiology, because of the delay in
15 treating the -- well, what I can tell you, is it's some sort of
16 infection. What the doctors said to me was, because of the
17 delay in treatment, they could not tell me whether it could
18 have been arrested if it had been treated immediately.
19 Sometimes with kidney disease if it is treated early, it can be
20 stopped, or slowed down, so that he would not be in the
21 condition he is in now. They wouldn't say to me, well, it
22 would never have developed to that point. But they said with
23 this type of disease, if you catch it early enough, if you
24 treat it, you can sometimes, or often, arrest it so that you
25 have 10 more years, or whatever more years, until you get to

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1 the point where you need dialysis. Because there was several
2 months of delay, by the time he got to the hospital, there was
3 no -- he required dialysis right away. So there was no
4 treatment for it, short of the dialysis. Those are the facts.

5 THE COURT: Thank you.

6 MR. MOSKOWITZ: If I may, I do want to make one
7 observation. Your Honor is looking at Mr. Burden and sees a
8 young man who looks, for all intents and purposes, healthy. I
9 think this is not the picture that I saw last night, I don't
10 know, 15 hours ago or less. Mr. Burden, when I saw him, was
11 hooked up to the dialysis machine. He looked frail. He was
12 shaking. He has lost weight.

13 THE COURT: How long has he been on dialysis?

14 MR. MOSKOWITZ: What?

15 THE COURT: How long has he been on dialysis?

16 MR. MOSKOWITZ: Since I think the end of April, early
17 May. I think he actually went into the hospital May 2, May 3,
18 somewhere around there. And, it's not an easy process. It
19 is -- how long are you on each time, a couple of hours?

20 THE DEFENDANT: Four hours.

21 MR. MOSKOWITZ: Four hours.

22 It's a four-hour treatment, three times a week, so.
23 And that is so that he can move around. I mean when he went
24 into the hospital, it was an emergency. This time it was an
25 emergency. The dialysis allows him to have some semblance of

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1 normalcy for that interim period. But if he doesn't get it, he
2 immediately gets sick and gets significantly weaker.

3 The diet is another issue that has been a constant
4 problem for him.

5 THE COURT: What is the issue with the diet?

6 MR. MOSKOWITZ: The issue with the diet is he can't
7 eat what they are giving him. It makes him sick?

8 THE COURT: Says who?

9 MR. MOSKOWITZ: It makes him sick. That is the simple
10 answer. It's not, as in the hospital, he gets specific food
11 for people with, you know, that are in his condition. The MCC
12 does not have that capability. It's much more limited in terms
13 of their selection for inmates. And the food that he was being
14 given was making him sick. And so he stopped eating it, in
15 large part.

16 THE COURT: Okay.

17 MR. MOSKOWITZ: So.

18 THE COURT: Thank you.

19 Mr. Burden, you have an absolute right to address the
20 Court before I impose sentence. Is there anything that you
21 wanted to say?

22 THE DEFENDANT: Yes.

23 THE COURT: Yes, sir. You can remain seated. Just
24 speak clearly into the microphone, okay?

25 THE DEFENDANT: All right.

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1 First, I would like to say good afternoon, your Honor.
2 And, well, what I would like to say, before sentence, is that,
3 yeah, I did, you know, plead guilty to the crime at hand. And
4 I did have time, you know, because you don't -- people in life
5 don't really get a chance to look at theirselves from the outside
6 point of view. And I got the chance to see how, you know,
7 pathetic that video was, you know. How sorry I looked. And
8 what everything was costing me. And I have a -- I had two
9 years to figure out everything, and where everything was
10 heading. And then for me to get sick, it puts me right exactly
11 where -- you know, it puts me -- like it forces me on a track
12 that I don't -- I don't -- I don't want to be on, but I have to
13 be on. And it's like only thing I could think of is how long
14 I'm going to have left, and how much time I'm going to get to
15 spend with my peoples. Because there is never gonna be an
16 exact prognosis or exact prediction on how anything would turn
17 out, as far as the kidneys. And every single day I go to
18 sleep, and I wake up, I thank God to be woken. Because at any
19 given time, any given time, I could go into a state where it's
20 the point of no return. At any given time, this could happen
21 for me.

22 Only thing dialysis does is keeps me alive. Just
23 because I'm on dialysis, doesn't even mean that it's gonna work
24 for me. Some weeks dialysis doesn't even work for me and I
25 have to be hospitalized, because of my potassium level remains

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1 high, my cholesterol remains high. Just because I get
2 dialysed, don't mean anything. And when -- that being said, it
3 is like, I -- I -- I just -- I just want -- I just want
4 somehow, some way, if -- if -- if that's gotta be the rest of
5 my life, can I please have a chance to make things right. Can
6 I please have a chance to make things right. If I don't have
7 that much time. And if I get this kidney transplant and it
8 doesn't work. And that time being, until then, can I please
9 have a chance to right my wrongs, and get as far away from as
10 who I used to be as possible. Please, your Honor.

11 Thank you for giving me the chance to speak.

12 THE COURT: Thank you, Mr. Burden.

13 And in deciding what sentence to impose, I have
14 considered all of the factors set forth in Section 3553(a) of
15 Title 18 of the U.S. Code including, as most directly relevant
16 to this case, the nature and circumstances of the offense, and
17 the history and characteristics of Mr. Burden.

18 I have considered the need for the conditions imposed
19 to reflect the seriousness of the offense, to promote respect
20 for the law, to provide a just punishment for the offense, and
21 to afford adequate deterrence to the criminal conduct. To
22 protect the public from further crimes on behalf of Mr. Burden.
23 And to provide the defendant with needed medical care or other
24 treatment in the most effective manner.

25 I have considered the need to avoid unwarranted

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1 sentence disparities among similarly-situated defendants.

2 And in light of all that, this remains an incredibly
3 difficult sentence to impose. Obviously, it was a very serious
4 crime, with tragic consequences. I presided over the trial of
5 the three co-defendants and was able to see, through the
6 testimony of the various cooperating witnesses, the environment
7 in which Mr. Burden was raised. And I was struck by the truly
8 disturbing lack of appreciation on the part of all of those
9 young men -- and they were all teenagers, practically.

10 Mr. Burden included -- of the fragility and sanctity of human
11 life, much less the danger that they exposed themselves to on a
12 daily basis. Much less a lack of respect for the rule of law.

13 It truly was, as one of the defense lawyers put it in
14 his opening statement to the jury, that the jury would have to
15 enter another world in order to try to understand what it was
16 that motivated these young men.

17 And, indeed, I was very struck by this testimony.
18 There was testimony about Mr. Burden, himself, being shot in
19 the leg by a friend, as a favor so as not to have to shoot
20 Mr. Burden in the face, as the friend had been instructed to
21 do.

22 Did I get that basically right, Mr. Bauer?

23 MR. BAUER: It was in the foot, your Honor. But, yes,
24 it was in order to save -- the other -- the other people wanted
25 to shoot Mr. Burden in the face. And so he said, no, I'll take

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1 care of it. And he shot him in the foot instead.

2 And that's what counts as being kind and generous in
3 the Newburgh in which Mr. Burden grew up. To be sure, no one
4 in this room should be terribly surprised that Mr. Burden came
5 to live the life that he did, or should be terribly surprised
6 that he would see the need, or the attraction of joining a gang
7 like The Bloods.

8 He is a person about whom it can be fairly said that
9 he barely had a chance in life. His father abandoned him. His
10 mother was unable to care for him as a result of her
11 addictions. And his grandmother, who was kind enough to bring
12 him in, was overwhelmed by having to raise her daughter's
13 children, and sought at times to have him put in a half-way
14 house.

15 Mr. Burden suffered from a number of mental conditions
16 that required medication and treatment, perhaps some of which
17 he went without, and caused him to be hospitalized at least
18 five times as a boy.

19 At the same time, the Court cannot overlook the
20 immensity of the criminal conduct that Mr. Burden has admitted
21 to. A man is dead. And Mr. Burden played a supporting role in
22 his death. And I appreciate the comments of counsel, and the
23 government, that Mr. Burden had no idea that that would be the
24 result.

25 And the sentencing guidelines reserve the most serious

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1 sentences for cases such as this. And I also appreciate that
2 Mr. Burden has been granted an extraordinary benefit already by
3 being allowed to plead guilty to an offense that is limited to
4 no more than 10 years of incarceration. I also consider that
5 this is not the first time Mr. Burden has appeared before a
6 Court. He does have a criminal history, which is not a
7 terribly impressive criminal history, but a criminal history,
8 nonetheless, that includes orders of protection that were put
9 in place with respect to certain of his family members.

10 Finally, there is the fact of Mr. Burden's physical
11 condition. I don't have a medical report from Mr. Burden's
12 treating physician, so I have no idea of the seriousness of his
13 current condition, and what the prognosis is.

14 I accept counsel's representation, because counsel is
15 representing as an officer of the Court and because of the
16 Court's general knowledge, that typically speaking when someone
17 is caused to be on dialysis that is something that they don't
18 get better from. Dialysis has to continue, or some other,
19 something else has to happen, like a transplant. And certainly
20 the fact that he is on dialysis suggests that his condition is
21 very serious, indeed. And because of that, his incarceration
22 will therefore be significantly more onerous than that of the
23 average defendant.

24 With respect to the deterrent, I do believe that there
25 is an argument to be made that general deterrence requires that

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1 Mr. Burden be made to serve some additional time in prison.

2 And, in any event, for all of those reasons, it is the
3 judgment of the Court that Mr. Burden be sentenced, and be
4 committed to the custody of the Bureau of Prisons for 48 months
5 on the count of conviction. That will be followed by three
6 years of supervised release. The conditions of supervised
7 release in the presentence report will be adhered to; that is
8 to say, the standard conditions 1 through 13, as well as the
9 standard mandatory conditions.

10 In addition, I will require that he participate in a
11 program to determine whether he has reverted to using drugs or
12 alcohol; that he be made to participate in a program, a mental
13 health program; and that he shall continue to take any
14 prescribed medications unless instructed to by the healthcare
15 provider; that he submit his person and residence to -- his
16 premises to a search by the probation office, if the probation
17 officer has reasonable belief that contraband or evidence of a
18 violation of the conditions of release may be found; and that
19 he report to the nearest probation office within 72 hours of
20 release from custody.

21 I should also note that the reason for the substantial
22 variance from the guidelines is also because he will be away
23 from his family if, as everyone expects, he is designated to
24 either Devons or Butner or some other similar facility. And I
25 am familiar with those facilities, and know that they will be

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1 able to provide Mr. Burden with the medical treatment that he
2 requires during the balance of his incarceration.

3 Does counsel know of any legal reason, other than what
4 has already been stated, that the sentence should not be
5 imposed as stated.

6 MR. BAUER: No, your Honor.

7 MR. GINSBERG: No, your Honor.

8 THE COURT: Very well, then.

9 Mr. Burden, it is the judgment of the Court that you
10 be committed for 48 months on the count of conviction. That
11 will be followed by three years of supervised release. I also
12 order you to pay a special assessment in the amount of \$100,
13 which shall be due immediately. I will not impose a fine, as I
14 find that you are not able to pay a fine.

15 I take it the government is not seeking forfeiture?

16 MR. BAUER: No, your Honor.

17 THE COURT: Are there any open counts?

18 MR. BAUER: There are, your Honor.

19 Mr. Burden pled guilty to the S-2 Information. The
20 government moves to dismiss the counts in the underlying
21 indictment, as well as the S-1 indictment.

22 THE COURT: That application is granted.

23 Mr. Burden, because of your plea agreement with the
24 government, I understand that your appellate rights are fairly
25 limited. But, Mr. Ginsberg, will you assure me, and Mr.

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1 Moskowitz, will you assure me that you will speak with
2 Mr. Burden about the sentencing, the appellate rights that he
3 has, such as they may be, and that he do so as soon as
4 possible.

5 MR. GINSBERG: We will, your Honor.

6 THE COURT: Are there any other applications, Mr.
7 Ginsberg?

8 MR. GINSBERG: Yeah. I think that, before we leave,
9 your Honor, we need to make sure, however, that he needs to
10 be -- that, your Honor, if you can, if you have the authority
11 at this point, order that Mr. Burden be taken back to Bellevue
12 Hospital, which I believe is consistent with my understanding
13 of what Adam Johnson, who is the head of the Legal Department
14 at the MCC wants. And I believe it was also consistent with my
15 understanding of what the marshals wanted. Because they don't
16 want to have to deal with the medical situation back in the MCC
17 and retransport him to Bellevue.

18 So if that can be accomplished, or it needs some
19 writing to be accomplished before he leaves the building, so
20 that they can take him directly there. Whatever needs to be
21 done, I would appreciate that that be taken care of.

22 MR. MOSKOWITZ: If I just might add a little bit to
23 that. The goal here, as I understood it in my conversations
24 with Mr. Bauer and communications with Mr. Johnson, is that if
25 Mr. Burden goes back to Bellevue, as I think all of the parties

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1 had anticipated, he will have the surgery within the next week
2 or so, at the latest, and whatever time that he will require to
3 recuperate. It is our hope that the government, working with
4 the Bureau of Prisons, will be able to accomplish the
5 designation to a medical facility in an expedited fashion, so
6 by the time he is ready to be released from Bellevue, post op,
7 he will be able to go directly to the medical facility so that
8 we won't have a repeat of any of the problems at the MCC. And
9 I think the MCC really does not want him back. I know he
10 doesn't want to go back. And I think it would be best for all
11 concerned if we can accomplish that with your Honor's help.

12 THE COURT: Well, it sounds like that is what everyone
13 wants to happen. And I don't know that -- first of all, I
14 don't know that an order is required, since that is what the
15 MCC wants to do.

16 Secondly, I don't know that an order would be
17 appropriate, since he will be in their custody.

18 Moreover, in connection with a situation like this, I
19 am very reluctant to enter an order affecting the medical
20 treatment that someone is getting, or should be getting, as I
21 have no insight in that regard, and I could be ordering
22 something that is contraindicated.

23 MR. GINSBERG: I'm not asking for medical treatment.
24 Maybe I should have put it a different way. Just as if I would
25 be asking your Honor, in a different situation, to recommend a

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1 facility of placement, I would recommend -- I would ask your
2 Honor to recommend that Mr. Burden be taken back to Bellevue
3 Hospital, and then allow the process to go forward from there.

4 THE COURT: I'm happy to make that recommendation.
5 And I'm happy to do that. I know members of the marshal
6 service are here.

7 Is there any particular recommendation or direction
8 that you need, from me, in order to have Mr. Burden taken back
9 to the hospital.

10 THE MARSHAL: I don't think so, your Honor. Because
11 they brought him from the hospital, here, so they are going to
12 bring him right back, I understand. Probably, as I understand
13 it, he has to go back for the surgery.

14 THE COURT: Very well.

15 THE MARSHAL: I would think they are waiting on us to
16 bring him back to the MCC or back to Bellevue, probably have
17 transport teams waiting for us to bring him back.

18 MR. BAUER: That's all consistent with my
19 conversations with Jim Kahn, who is in charge of the inmate
20 movement here for the marshals. And what I'll say is that
21 we'll also move expeditiously to have his designation be made.

22 And so I'll renew what I asked earlier, which would be
23 if your Honor can enter the judgment as soon as possible.

24 THE COURT: Yeah, we'll try to do that today --

25 MR. BAUER: Okay.

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1 THE COURT: -- okay, and --

2 MR. BAUER: And if you could put in that judgment,
3 I'll make the application that I'm sure they were going to,
4 asking you make that recommendation that he be designated to a
5 medical facility appropriate for his condition, such as --
6 however you want to say it -- such as Butner or Devons.

7 THE COURT: Very well. I'll make that recommendation.

8 THE DEFENDANT: Thank you, your Honor.

9 THE COURT: Anything further?

10 MR. BAUER: Not from the government, your Honor.

11 MR. GINSBERG: Thank you very much for your
12 consideration, your Honor.

13 THE COURT: In that event, we're adjourned.

14 Mr. Burden, good luck to you, sir.

15 THE DEPUTY CLERK: All rise.

16 (Adjourned)

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